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IN THE

Supreme Court of the United States

October Term, 1965

No. 486

ROY E. GUSOW and DONALD H. ORANSKY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The petitioners, Roy E. Gusow and Donald H. Oransky, pray that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Tenth Circuit entered in the office of the Clerk of that court on June 25, 1965, unanimously affirming with a written opinion a judgment of conviction of the United States District Court for the District of Colorado, entered on January 8, 1964.

Opinion Below

The United States District Court for the District of Colorado entered no opinion. The United States Court of Appeals for the Tenth Circuit did. Its opinion, handed down on June 25, 1965, is reproduced at Appendix I, *infra*, pp. A1-A10. This opinion is not yet reported.

Jurisdiction

The final judgment of the United States Court of Appeals for the Tenth Circuit was made and entered on June 25, 1965. Mr. Justice Byron R. White, upon application of counsel for petitioners, ordered that the time for filing the petition for a writ of certiorari in this cause be, and it was, extended to and including August 24, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does a judgment of conviction based on a jury verdict of guilty, where there was insufficient evidence to go to the jury, violate due process?

2. Should a federal trial judge who has doubt about the guilt of the defendants, nevertheless submit the case to a jury?

Statutory Provision Involved

18 U.S.C. §1341, 62 Stat. 763:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places

in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Statement of the Case

The petitioners, Roy E. Gusow and Donald H. Oransky, together with a third defendent, Melvin L. Shapiro, were jointly indicted, tried and convicted on eight counts of using the mails to defraud, in violation of 18 U.S.C. §1341. All of the defendants were from out of the state of Colorado.

In the words of the Tenth Circuit; "This prosecution grew out of the activities of the appellants in soliciting applications from persons interested in foreign or overseas employment, primarily in the construction trades. The usual course of operation by the appellants, doing business in Denver, Colorado, as "Overseas Application Services", (O.A.S.) began with the insertion of an advertisement in a newspaper of general circulation, indicating that applications of qualified men and women would be accepted or prepared for employment overseas. The advertisements each stated times and dates when and where interviews would be conducted in the area. The interviews were handled and applications taken by the appellants personally and by their "salesmen" in either a hotel or

motel suite rented for that purpose. When completed, the applications were sent to the O.A.S. Denver office where copies were prepared and mailed to ten companies purportedly engaged in or contemplating overseas projects. For this an applicant was charged a total of $22.50, or $2.25 per application." App. I, *infra* pp. A3-A4.

In 1961 Mr. Oransky conversed with one working in foreign countries, and taking note of the available opportunities and high income (R. 358) determined to make a more thorough study of the matter. His reading of material available to him in the public library and a study of a Department of Commerce pamphlet led him to the conclusion that,

> "I could perform a valuable service by getting the names of people who were interested in overseas work plus a valuable service to the companies that were contemplating or had contracts overseas" (R. 363).

Mr. Oransky then contacted Mr. Shapiro and Mr. Gusow and explained to them the service he would like to perform, i.e., " * * * secure applications from individuals that are interested in putting their names in front of companies that either had contracts or were contemplating contracts overseas" (R. 365). Oransky was asked by the two if he would call ten or twelve companies appearing on the list of overseas employers contained in the *Overseas Construction List and Guide* (R. 365). This he did by telephone and was told from time to time the companies needed occupations of various sorts and received as many as fifty and sometimes a hundred applications a day for overseas employment. From the ten or twelve

companies contacted by him, no negative response was received (R. 366).

Following discussion with Oransky concerning the matter, Mr. Shapiro went from Denver to New York to meet with Harry Godgart, the publisher of *Overseas Construction List and Guide* (R. 454). His stated purpose of this trip was "to thoroughly investigate the quality of these listings. I wanted to thoroughly investigate the validity of these companies before I went into this business" (R. 456).

Mr. Godgart was an expert of ten years' standing in New York City in the field of overseas employment. He had published for the past ten years a bi-monthly pamphlet called *Jobs Overseas.* This pamphlet concerns "jobs overseas, containing contracts, places of employment and types of work that they must have qualified applicants." He also has a book published yearly known as *Overseas List and Guide,* dealing with construction companies, and general information as to employment abroad (R. 431).

Mr. Shapiro testified to his conversation with Godgart as follows:

> "Yes, it was quite an extensive conversation that we had. He first—I wanted to find out, of course, did he have these actual lists of companies who were contracting or contemplating contracting overseas, and yes, he showed me those lists. I asked him how did he secure these lists and he told me that he did, he did it by writing to these various companies. Also, sometimes he didn't have to write to the companies, the companies themselves would write to him. He also told me that—we ran into the subject of the opportunities overseas and he said there was

> a tremendous field and that there were constant job openings because to use his words, companies have a job to do. When they finish that particular project, they let their workers go until they get another contract and they re-hire all over again, and this process was a never-ending process going on all over the world. I think part of this conversation also pertained to his listings and I specifically asked about any men who subscribed to his magazine and sent applications to the the companies that he listed, did they ever receive a job from this, and he furnished me many letters to this effect from men who had received jobs from his listings" (R. 454-55).

Following the Godgart meeting, Mr. Shapiro called six or ten companies in New York and was advised that an application of a needed, qualified person would be considered (R. 456).

Thereafter, Gusow, Shapiro and Oransky started in the business, Overseas Application Services. They tried to do in Denver what Mr. Godgart had done in New York. Their material was taken in large measure from his publications, at times almost word for word. Their form of application was taken from various sources, but mostly from samples of the Colorado Employment Agency (R. 368).

As the very name the defendants used (Overseas Application Services) indicates, their service was an application service. They were not an employment agency. They simply prepared ten applications, and submitted them to as many different companies who were employing abroad.

Oransky was in charge of securing applications and training salesmen. Gusow and Shapiro were in charge of

the office, which was to take the applications, duplicate them ten times and mail them to ten different companies employing abroad (R. 366-367). At first their price for this application service was at the rate of $1.75 per application, or $17.50 for ten applications; but at this price they were losing money, and they accordingly raised their price 50¢ per application to $22.50 for ten applications (R. 384, 472).

Advertisements were placed in newspapers in Kansas City, Wichita, Albuquerque and Springfield, Missouri. For this purpose the defendants retained the Harold Storm Advertising (R. 36). A representative of that company said he reviewed the advertisement with the defendants, and examined the same for any misrepresentation, good taste, a complete explanation and honesty (R. 60). He then personally contacted each of the four newspapers and after explanation of the purpose of the ad and the function of the organization " * * * it was quite clear in their mind that the ad as it was prepared was fully acceptable to them and to their readers" (R. 58).

The case against the defendants is epitomized by the testimony of the government's first applicant witness, Mrs. Ruth S. Hazen, a Wichita, Kansas, secretary. After having her recollection strenuously refreshed on cross-examination, she had to admit that she and her husband each had 10 duplicates made of their applications, for a total of 20 duplicates, which were sent to different companies employing abroad, and all for a total price of $22.50, or $1.25 per application (R. 82). Moreover, her husband got three responses from these companies (R. 78). Her husband expressed the view that they would not get anything for their

effort, but she thought it was worth "$22.50 to find out" (R. 77, 78).

The conscientious conduct as well as the good faith of the defendants was demonstrated by the fact that they had a staff consisting of a secretary and 3 typists in order to duplicate and mail out these applications. One of these typists, Mildred Ann Munch, even took work home with her (R. 446-47). The secretary, Rosemary Hill, who attended the University of California at Berkeley, and whom the government subpoenaed but did not call to the stand testified that the applications were processed and mailed diligently and expeditiously (R. 451). She further testified that she did not remember receiving any complaints from applicants (R. 451); and there were some 150 of these.

Moreover, the defendants lost money in the venture. The total receipts of the Overseas Application Services amounted only to $3,137.25 (R. 475). The expenses exceeded this figure. Gusow testified that he "lost about $250 out of his own pocket" (R. 471).

That the case against the defendants did not amount to anything, the trial judge indicated on more than one occasion. For instance, at the time of the motion for a new trial, he commented:

> "• • • I am not sure that I would have found them guilty if it had been tried to me as a tryer of the fact, but it wasn't" (R. 514).

On the same occasion, he remarked on the curious absence of any real complaining witnesses:

> "• • • As a matter of fact, there were few real anguished criticisms from the victims, so-called.

> Counsel said that one of the witnesses showed some spirit and really the witnesses didn't seem to be particularly disturbed by this at all, which is somewhat unusual" (R. 513).

At the time of the sentencing the trial judge conceded that the business venture challenged in this case was probably legitimate; and then went on with his sentencing on the basis of material not in this or any other record:

> "* * * They probably were going legitimate on this one and it backfired. It does happen that way, unfortunately, and this is a factor to me, that this doesn't carry the same impact from my standpoint and is in mitigation of this sentence. I don't think it detracts from the fact that they have been, over the years, really taking great hazards and that this has been their background, that they have been taking the public, and it is a matter of tremendous public impact and interest."

No person should be sent to prison on any such basis. The trial judge should never have allowed the case to go to the jury, particularly in the light of *Singer* v. *United States,* 380 U.S. 24 (1965).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals for the Tenth Circuit in affirming a judgment of conviction based on a jury verdict of guilty, where there was insufficient evidence to go to the jury in the first place, decided a federal question in a way in conflict with applicable decisions of this court.

There was insufficient evidence in the instant case to go to the jury. The trial judge on several occasions in effect conceded as much. He stated at the time of the motion for a new trial that he was not sure whether he would have found the defendants guilty if it had been submitted to him as a trier of the fact (R. 514). He commented on the same occasion on the absence of any real complaining witnesses (R. 513). He stated at the time of sentencing that the petitioners "probably were going legitimate on this one".

Since there was as complete an absence of proof of any criminal conduct in the instant case, as there was in *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 (1960), where this Court reversed convictions on the due process ground that there was "no evidence whatever in the record to support these convictions," the instant judgment of conviction should be reversed. *Accord, Garner* v. *Louisiana,* 368 U.S. 157 (1961); *Taylor* v. *Louisiana,* 370 U.S. 154 (1962); *Fields* v. *City of Fairfield,* 375 U.S. 248 (1963).

II.

The Court of Appeals for the Tenth Circuit in affirming the instant judgment of conviction based on a jury verdict of guilty, where there was insufficient evidence to go to the jury in the first place, decided a federal question which has not been, but should be, settled by this court.

The trial judge said in so many words that he was not sure that he would have found the petitioners guilty if the case had been submitted to him as a trier of the fact:

> "* * * I am not sure that I would have found them guilty if it had been tried to me as a tryer of the fact, but it wasn't. And the jury concluded on this dispute of facts to whether they were in good faith or not, or whether it was a scheme, and I just would not be at liberty to overrule that determination. I think it would be out of line if I did" (R. 514).

The trial judge's statement indicates that he thought petitioners had a choice as to whether they were to be tried by a jury or not. We know since *Singer* v. *United States*, 380 U.S. 24 (1965) that the petitioners had no such choice. They could waive a jury only with the consent of the government. It is accordingly submitted that *Singer* suggests that when a trial judge has as much doubt as the judge in the instant case did as to the sufficiency of the evidence to establish guilt, he should direct a judgment of acquittal.

CONCLUSION

The instant petition for writ of certiorari should be granted.

Respectfully submitted,

O. JOHN ROGGE
Attorney for Petitioners

APPENDIX I

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

May Term, 1965

No. 7668

ROY E. GUSOW,

Appellant,

Vs.

UNITED STATES OF AMERICA,

Appellee.

No. 7669

MELVIN L. SHAPIRO,

Appellant,

Vs.

UNITED STATES OF AMERICA,

Appellee.

No. 7670

DONALD H. ORANSKY,

Appellant,

Vs.

UNITED STATES OF AMERICA,

Appellee.

V. G. Seavy, Denver, Colorado, (Anthony F. Zarlengo and Richard A. Zarlengo, Denver, Colorado, with him on the brief) for Appellants Roy E. Gusow and Melvin L. Shapiro.

O. John Rogge, Denver, Colorado, (Leslie A. Gross, Denver, Colorado with him on the brief), for Appellant Donald H. Oransky.

Milton C. Branch, Assistant U. S. Attorney, Denver, Colorado, (Lawrence M. Henry, U.S. Attorney, Denver, Colorado, with him on the brief), for Appellee.

Before PICKETT and BREITENSTEIN, U.S. Circuit Judges, and CHRISTENSEN, U.S. District Judge.

PICKETT, Circuit Judge.

The appellants, Gusow, Shapiro and Oranksy, were jointly indicted, tried and convicted on eight counts of using the mails to defraud, in violation of 18 U.S.C. §1341. The sole issue raised on this appeal is whether the appellants were entitled to a judgment of acquittal for lack of substantial evidence to show either a scheme or the requisite intent to defraud.

The crime of mail fraud is broad in its scope, and may ordinarily be shown by proof of the intentional devising of a scheme to defraud and that the mail was used in furtherance of the scheme.[1] Linden v. United States, 4 Cir., 254 F. 2d 560; Deschenes v. United States, 10 Cir., 224 F. 2d 688; United States v. Baren, 2 Cir., 305 F. 2d 527. The scheme is one to defraud if it is reasonably calculated to deceive persons of ordinary prudence and comprehension. Silverman v. United States, 5 Cir., 213 F. 2d 405, cert. denied 348 U.S. 828; United States v. Baren, supra. Direct proof of willful intent is not necessary. It may be inferred from the activi-

[1] The use of the mails in connection with the activities of the appellants is admitted.

ties of the parties involved. Henderson v. United States, 6 Cir., 202 F. 2d 400. Not only are the patently false statements prohibited, but also those made with a reckless indifference as to whether they are true or false. Babson v. United States, 9 Cir., 330 F. 2d 662; cert. denied, 377 U.S. 993; West v. United States, 10 Cir., 68 F. 2d 96. Similarly, the deceitful concealment of material facts may also constitute actual fraud. Cacy v. United States, 9 Cir., 298 F. 2d 227. Moreover, the deception need not be premised upon the verbalized words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance. Linden v. United States, supra.

This prosecution grew out of the activities of the appellants in soliciting applications from persons interested in foreign or overseas employment, primarily in the construction trades. The usual course of operation by the appellants, doing business in Denver, Colorado as "Overseas Application Services", (O.A.S.) began with the insertion of an advertisement in a newspaper of general circulation, indicating that applications of qualified men and women would be accepted or prepared for employment overseas.[2]

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[2] The advertisements, which the court considered to be patently deceptive, appeared with only slight variation in the following manner:

"MEN and WOMEN ages 18 to 50 who want applications prepared for OVERSEAS JOBS. Applications are now being prepared for men and women who feel they can qualify for the following: Welders, Pilots, Co-Pilots, Airline Mechanics, Truck Drivers, Dragline Opr., Construction Men. Bulldozer Opr., Semi-skilled Workers, Many Others; Typists, Stenographers, Warehousemen, Airport Employees, Plumbers, Skilled Workers, Electricians, Accountants, Bookkeepers, Secre-

(Continued on page A4)

The advertisements each stated times and dates when and where interviews would be conducted in the area.[3] The interviews were handled and applications taken by the appellants personally and by their "salesmen" in either a hotel or motel suite rented for that purpose. When completed, the applications were sent to the O.A.S. Denver office where copies were prepared and mailed to ten companies purportedly engaged in or contemplating overseas projects. For this an applicant was charged a total of $22.50, or $2.25 per application.[4]

When an applicant appeared at the place designated for the interview, he was first handed a copy of a two-page "General Information on Overseas Jobs" bulletin to read. This information sheet contained generalized statements regarding the policies of the companies doing work overseas, and working conditions. It also contained numerous references to pay and monetary rewards of working over-

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(Continued from page A3)

taries. Interviews Friday, Sept. 15 5:00 p.m. only. Sat. and Sun. Sept. 16 & 17 9 a.m. to 9 p.m. only KENTWOOD ARMS, 700 St. Louis St. Springfield, Mo.

If you are skilled or semi-skilled and in good health, there are top-paying job opportunities to $1500 monthly with little or no taxes, adventure and excellent living conditions. Contact our O.A.S. representative at the above address."

[3] Advertisements were placed in newspapers and interviews and applications were conducted in such cities as Pueblo, Colorado; Wichita, Kansas; Springfield, Missouri; and Kansas City, Missouri. The activities in any of these cities was from two to four days.

[4] The evidence indicates that the charge initially was $17.50 and was later raised to $22.50.

seas.[5] After reading and returning the information sheet, the applicant, if he so desired, would be given an "application" form to be filled out, following which he would then be interviewed by one of their "salesmen." The application form is complete on one side of a letter-size page. It does not indicate that it is an application of O.A.S., and it seeks only the most rudimentary personal information. The 10 copies when typed at Denver for mailing to the companies, of course could not be signed by the applicant.

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[5] The "General Information" sheet contained, among other things, the following statements:

"Overseas wages generally run anywhere from 45% to 75% higher than comparable wages in the United States. In addition to this, there is always overtime, and sometimes an extra cost-of-living allowance. On most overseas jobs, the cost of living is much cheaper than in America." * * *

"By and large, the basic attraction of working outside of the Continental Limits of the United States lies in the fact that the financial rewards are much higher, plus the fact that the American dollar in foreign lands has a fabulous buying power when converted into foreign money." * * *

"For instance, in France, if you are working for the U.S. Government and making, say, a low wage of about $6,500 annually (including various government allowances). you are able to live extremely well and save money besides. The reason for this is obvious when you consider that, even in Paris, you can buy an excellent meal with the rate of exchange between the French Franc and the American dollar. * * * Some of the overseas installations for men are in comparatively remote areas, but, nevertheless, it is strictly up to the individual's desire whether he saves money or not. As an instance, there is a particular case I know of, where two men drawing exactly the same salary on a civil service project in Trinidad, after about two years, had entirely different bank accounts. One man, who went nowhere for entertainment the entire two years, saved about $14,000; the other man cavorted, had a wild time, and still managed to save about $8,000 after two years. * * * We endeavor to categorize various jobs, and the locations of same in such a way as to facilitate every applicant's chance of being hired for the job and location he or she is seeking. * * * So you see—whether you are a ditch digger or a doctor—you have a chance Now for BIG MONEY! EXCITEMENT! ADVENTURE!"

The major portion of the "interview" appears to have been devoted to obtaining the applicant's signature upon a document referred to as a "contract." The contract was on a page separate from the application, and purported to set forth the whole agreement between O.A.S. and the applicant. The contract carries the heading "Overseas Application Services", followed by a Denver post office box address, and date space. Next following are three spaces in which the applicant listed in order his preference of the areas of the world in which he desired employment. The body of the agreement sets forth the undertakings of the parties, and provides for the reproduction and distribution of the applications by O.A.S. and recites the obligation of the applicant to pay. Other statements contained in the body of the agreement may be characterized as exculpatory in nature.[6] It concludes with spaces for the signature of the "Authorized Representative of O.A.S." and the applicant. Directly under the space for the applicant's signature is the statement: "I understand that I am not obligated to accept any employment which might arise through the efforts of O.A.S." It was also stated in the contract, and each applicant was told, that they would receive from O.A.S.

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[6] The following statements are taken from the contract:

"1. I understand that all statements made on my application are true to the best of my knowledge."

"2. I understand that O.A.S. is not an employment agency and this is not a guarantee of a job, or offer of employment."

"4. I understand that after O.A.S. completes the above agreement, that all future correspondence will be between me and the companies to whom my applications have been submitted."

"I certify that there have been no verbal promises or agreements other than those appearing above."

"I certify that I have thoroughly read this agreement and understand the contents fully and acknowledge receipt of an exact copy of this agreement."

a list of ten companies to which the application was sent. It appears that there were four basic lists of companies, and that the applications were sent to the companies listed on one of the four. There was no proof that O.A.S. did not duplicate or send the number of applications it represented would be sent.

The applicants who were called as witnesses for the government testified, in substance, that they were led to believe that it was O.A.S. which was hiring; that O.A.S. was representing directly the companies which were hiring; that probabilities of getting jobs were good; that salaries were exceptionally good; that income would be non-taxable; and that other applicants had been placed. Most applicants also indicated that they were told at the interview by the O.A.S. representative that they had good qualifications and that they would no doubt be hearing from the companies soon.[7]

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[7] The witness Hazen testified on direct examination as follows:

"Q. Now, Mrs. Hazen, at the time that you had this conversation with the salesman, was the application form that you filled out in the room? A. Yes, he had it and looked at it and said that we were both well qualified because secretaries or stenographic work was always required on such a job and that my husband's application was good and there would be no question about it. Then, his company, with offices in Denver, had been established for a number of years and had contacts with overseas companies, not necessarily overseas companies, but companies that were doing work overseas and hired people. His company had contacts with them and knew who was needed, where, and in this they would send our applications to ten different companies and at that time he couldn't tell us just which companies because the office had the information in Denver of which companies would be in need of the type of work that we did, but our application would go to them and that we would hear from the companies and then, from then on, our dealings would be with the company."

(Continued on page A8)

Representatives of the companies to which the applications were sent testified without significant variation that all of the applications were received by them on the same day, or over a very short period of time; that there was nothing to indicate they came from O.A.S. and that there was no return address; that the applications could not be

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(Continued from page A7)

And, on cross-examination, as follows:

"Q. So you knew you weren't going to hear from OAS after they had sent you the list of the 10 companies and mailed your applications out? A. I didn't expect to hear from OAS. I expected to hear from the companies my applications had been sent to."

The witness Brooks testified that in his conversation with the appellant Oransky he was told:

"He told me that they were American companies, overseas, that had Government contracts and that this OAS was a kind of a, they were in contact with these companies."

The witness Miller also testified as to his conversation with Oransky:

"Q. (Mr. Branch) Now, would you relate to the Court and jury what transpired in this interview that you had with the defendant *Oranski*? A. Well, he said that my application qualified and that I had, that this was hiring a lot of people about this time of year and that likely I would get a job and then he said that he would, for a fee, that he'd send my applications to 10 different companies and that I'd be hearing from the companies soon and not to be in any hurry about picking one, I wouldn't have to be in a hurry about going, I'd have plenty of time to take care of things and that's about all. Q. Now, was there anything—any discussions concerning salaries? A. Yes, he said I'd make as much as three times what I am making now, up to $1,000 a month, he said."

And, on cross-examination, testified as follows:

"Q. Did you think that you were at the office of a company that was employing people for overseas construction work? A. No, I was under the impression that I was at a company that was hiring for construction companies to go overseas. Q. You were under the impression that Overseas Application Service itself was hiring persons for other companies that were doing work overseas? A. No, I was under the impression that they were taking applications for other companies and the other companies would do the hiring."

used by the company; that they used no mail application company and could not use the services of such a company; that they never heard of O.A.S.; that they hired only supervisory personnel or highly-trained technicians to send overseas, and never common tradesmen, semi-skilled or skilled labor; that no one was hired or even considered for a job on the basis of these applications; and nearly all stated that all of these applications were thrown away, many without being opened. The representative of one company stated that at the time the applications were received the company was not hiring for overseas work and that, in fact, most of its work was domestic.

The appellants each testified in his own behalf regarding the manner of operation and their good intent in conducting the operation. Oransky said the applicants were told that there was a demand for workers because he felt it was true. However, he also stated that O.A.S. had no information from any of the companies regarding the necessary qualifications for employment by them. He stated that O.A.S. had no direct contact with any of the companies and that their list, which was made up by excerpting the names of companies from trade publications, was the only connection. He stated that if he felt an applicant was qualified, he would be told that he might be hearing from the companies, and that he should not accept the first job offer. Oransky said that he never told any applicant that O.A.S. had no direct contact with the companies.

Shapiro testified that none of the companies were ever contacted to determine the authenticity of the periodical listings in the trade publications from which the O.A.S. list was made up. Gusow also stated that the companies

did not even know of the existence of O.A.S., but that none of the applicants were ever so informed.

Two fundamental rules of appellate review need only be mentioned here in passing. First, the evidence must be considered in the light most favorable to the government, and secondly, the verdict of the jury will not be set aside if supported by substantial evidence. These basic propositions and the test of review for sufficiency of the evidence are fully considered in Cartwright v. United States, 10 Cir., 335 F. 2d 919, and cases cited therein.

The gist of appellants' position here is that they organized a legitimate business and acted in good faith in their dealings with those who desired to use their services; that each applicant received exactly what he bargained for, and that there was no intent to defraud. In Beck v. United States, 10 Cir., 305 F. 2d 595, 598, cert. denied 371 U.S. 890, the court said:

> "Fraud or the existence of a fraudulent scheme is seldom susceptible to proof solely by direct evidence and in nearly every such case, direct and circumstantial evidence together with the inferences to be drawn therefrom must be relied upon for proof. On the face of the business operation involved here, it may be argued that it was merely a legitimate business venture that did not work out successfully. That, however, was a question of fact, to be determined by the jury after considering all of the evidence and the inferences to be drawn therefrom."

Considering the record as a whole, the foregoing statement is appropriate for this case.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 486

ROY E. GUSOW AND DONALD H. ORANSKY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. I) is reported at 347 F.2d 755.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1965. Mr. Justice White extended the time for filing a petition for a writ of certiorari to

and including August 24, 1965. The petition for a writ of certiorari was filed on August 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was sufficient evidence to support the jury's verdict.

STATEMENT

After a trial by jury in the United States District Court for the District of Colorado, petitioners and a co-defendant were convicted on all eight counts of an indictment charging the use of the mails in a scheme to defraud, in violation of 18 U.S.C. 1341 (R. 16-22).[1] On count one, petitioner Gusow was sentenced to two-and-a-half years' imprisonment and petitioner Oransky to one-and-a-half years' imprisonment, both with eligibility for parole to be determined by the parole board. Both petitioners were given concurrent five-year suspended sentences on each of the remaining seven counts, with a three-and-a-half year probation period to begin upon completion of the sentence imposed under count one (R. 27-28, 30-31).[2]

The evidence showed that petitioners and co-defendant Shapiro, doing business as the Overseas Ap-

[1] Reference is to the transcript of record before the court of appeals, filed with this Court.

[2] Co-defendant Shapiro's sentence was identical to that imposed upon petitioner Gusow (R. 28-30).

plication Service (O.A.S.), placed advertisements in newspapers of general circulation in various cities soliciting applications from persons interested in employment overseas (R. 36-39, 43-44, 109-112). The advertisements represented that such jobs offered good pay, "adventure and excellent living conditions," and "little or no taxes" (R. 6; Ex. 46, 46a, 55). The advertisements indicated that O.A.S. would conduct interviews with interested individuals at stated times and places and would prepare and forward to prospective employers the applications of those persons who were qualified for the jobs involved (R. 6; Ex. 46, 46a, 55).

Petitioners conducted a number of these interviews themselves (R. 68, 100, 112-113, 125-126, 158-160, 350-430),[3] and others were conducted by salesmen whom petitioners had instructed (R. 245-266, 288-323). Petitioners told their salesmen not to reject any applicant unless he was "completely unable or drunk or something like that" (R. 292). Petitioners and their salesmen represented to those who appeared for interviews that O.A.S. had "connections" with contractors seeking employees for overseas work. They told most prospective applicants that their qualifications "looked good" and that they should be able to get a job through the O.A.S. method (R. 62-79, 98-109, 112-116, 123-133, 135-142, 156-164, 245-266, 288-323). In addition, they provided each prospective applicant with a two-page document entitled "Gen-

[3] Petitioner Oransky used the name "Owens" in conducting some interviews (R. 125-126, 158-160).

eral Information On Overseas Jobs", which elaborated on the representations concerning pay, taxes and living conditions contained in the newspaper advertisements (R. 63, 99-100, 112-113, 124; Ex. 27). After completing the short job-application form, calling for only the most rudimentary personal information, the applicants were informed for the first time that there was a charge for O.A.S. services (R. 68, 100-101, 113, 125-126). They were then asked to sign contracts which provided that, for a fee of $22.50,[4] O.A.S. would send copies of their job applications to ten different companies involved in overseas projects, the companies to be selected either by the applicant or by O.A.S. (R. 62-82, 101-107, 113-116, 127, 158-160; Ex. 4, 18, 28). Applicants were told that O.A.S. would select companies which, at the time, had projects in the countries they were interested in and needed employees in their particular job categories (R. 71, 75, 79, 125). Subsequently, many of the applicants received through the mails a list of the ten companies to which their applications had been sent by O.A.S. (R. 73, 89, 102, 127, 148, 271, 278, 337).

Contrary to their representations, petitioners and co-defendant Shapiro admitted at the trial that O.A.S. had no "connections" with any company hiring employees for overseas jobs (R. 326, 412-416, 462, 467-470). They also admitted that they never made inquiries of any such company to determine its

[4] The fee was originally $1.75 per company, but was increased to $2.25 per company. Most applicants entered into contracts whereby copies of their application would be sent to ten different companies.

employment needs, the qualifications it requires of prospective employees, or whether it ever made use of applications submitted by O.A.S. (R. 326, 413, 416, 418, 421, 460-463). Petitioners obtained the names of companies doing business overseas from a few generally accessible publications (R. 460), but made no further inquiry of any kind with respect to such companies (R. 326, 460-463, 470). As the court below pointed out, petitioners used "four basic lists of companies" in deciding where to send particular applications; in each case "the applications were sent to the [ten] companies listed on one of the four" (Pet. App. A7).[5] Petitioner Oransky testified that he did not know of a single applicant who ever received an offer of employment through the services of O.A.S. (R. 429).

Representatives of several construction companies to which O.A.S. had forwarded applications testified that petitioners' representations regarding higher pay and lower taxes on overseas jobs were not accurate (R. 181, 197, 207, 215, 232-233), that O.A.S. applicants were not adequately qualified for employment with their companies (R. 182, 187, 189, 227-230, 232-234), and that no O.A.S. applicants were considered

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[5] For example, the applications of a couple seeking secretarial and guard or stock clerk jobs in Hawaii, Scandinavia or Australia were sent to the identical group of ten companies which received the applications of a man seeking employment as a truck driver or construction worker in South America (R. 72-75, 101-103; Ex. 17, 23). The foreign personnel representative of one of these companies testified that his organization was only hiring highly skilled personnel (R. 227).

for employment (R. 177, 193, 200, 204, 218, 222, 230, 236-237).

Petitioners' defense was that O.A.S. was a legitimate operation. In addition to their own testimony to that effect (R. 351-358, 363, 365-371, 418, 454-456, 466-472), they called the publisher of "Jobs Overseas", who testified that he had had a conversation with co-defendant Shapiro regarding the general subject of overseas employment (R. 431-442), and introduced evidence that O.A.S. was financially unsuccessful (R. 430, 464, 471).

ARGUMENT

There is no merit to petitioners' assertions that the trial judge erred in submitting the case to the jury and that the evidence is insufficient to support the jury's verdict. The use of the mails is undisputed. As for the scheme to defraud, the government's proof showed that petitioners made untrue representations —knowing some to be false and evincing total disregard for the truth or falsity of others—in order to persuade applicants to pay for O.A.S. services; that petitioners did not actually conduct the business of O.A.S. as represented to the applicants; and that the services of O.A.S. were worthless, both to the applicants and to the companies involved. This evidence was plainly sufficient to raise factual issues which required submission to the jury. The question of good faith, raised by the defense, was likewise for the jury to determine.

Petitioners seek support in certain comments, which they have taken out of context, made by the district judge in denying their motion for new trial (Pet. 8-9, 11) and imposing sentence (Pet. 9). But the judge was not expressing doubt as to petitioners' guilt in his remarks concerning the motion for new trial; he merely was commenting upon the subtlety and sophistication of their scheme and the jurors' perception in seeing through it (R. 512-514). Among other things, the district judge said: "* * * this is a very subtle, sophisticated scheme. This was apparent to me right along * * * and I do think that the talks of the salesmen were misleading all along the way * * * [R. 512]. There wasn't a chance on earth that any one of these buyers would ever get a job and if they had known the truth, they wouldn't have paid the $22.50, I am sure" (R. 513). He noted that the applicants were individuals who wanted adventure and who "* * * had visions of palm trees and things of that sort and they felt that this $22.50 investment might bring it to them, whereas in truth and in fact there was no possibility" (R. 513). It was then that the judge said:

> "So, I say finally, that it would not have been a surprise to me if the jury had returned verdicts of not guilty here because as I say, this was a very subtle and sophisticated transaction and the jury could well have had a reasonable doubt * * *" (R. 514).

The district judge's conclusion was unequivocal: "* * * I feel that the evidence is legally sufficient * * *" (R. 514).

At the sentencing proceedings, the judge speculated that petitioners might originally have intended to conduct a legitimate business, and he indicated that he would consider that possibility in mitigation. But he went on to say that this did not detract from the fact that "* * * they have been taking the public, and it is a matter of tremendous public impact and interest" (Pet. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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